RHB BANK BHD

v.

HASSAN MAWI

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CIVIL APPEAL NO: 12-44-2006-II]
25 APRIL 2007

CIVIL PROCEDURE: *Particulars - Further and better particulars - Application for - Whether particulars stated in pleadings are not sufficiently specific - Procedure - Before making a formal application to court, must request for further and better particulars by way of letter*

CIVIL PROCEDURE: *Rules of Procedure - Observance of - Whether action should be struck out for non-compliance of procedural rule when no prejudice is demonstrated - Whether breach can be remedied by amendments - Procedural jurisprudence a ghost of past*

HIRE PURCHASE: *Breach of agreement - Action to recover unpaid installments - Statement of claim states that 4th Schedule Notice and reg. 3 Notice served on hirer but dates of services not stated - Whether action should be struck out for omission to state dates*

The plaintiff/appellant was the owner and the 1st defendant below was the hirer of a motor vehicle pursuant to a hire purchase agreement made pursuant to the Hire Purchase Act 1967 (HPA 1967). The 2nd defendant below (respondent herein) was the guarantor. The appellant claimed for the balance sum under the hire purchase agreement for non payment of the installments. The appellant had served on the 1st defendant the notice in the Fourth Schedule of the HPA 1967 ("the said Fourth Schedule Notice") and notice in accordance with reg. 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 ("the said reg. 3 Notice"). The respondent/2nd defendant applied to strike out the appellant's action on the ground the appellant failed to plead in its statement of claim, the date of service of the 4th Schedule Notice and reg. 3 Notice, though it was pleaded that such notices were served on the 1st defendant. The appellant contended that by looking at the said statement of claim alone, it cannot be denied that the appellant's action against the 1st defendant was for the recovery of money arising out of a hire purchase agreement and suing the respondent/2nd defendant as the guarantor for the said hirer. The appellant claimed that it is clearly not a requirement under O. 46 r. 3 of the Subordinate Courts Rules 1980 that the date and mode of

A service of the said Fourth Schedule Notice and the said reg. 3 Notice must be specifically pleaded in the appellant's statement of claim. The learned Sessions Court judge had allowed the respondent/2nd defendant's application to strike out the appellant's action and hence this appeal.

B **Held (allowing the appeal with costs):**

(1) Pleadings are statements in writing, drawn up and filed by each party to an action stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer. If the particulars stated in the C pleadings are not sufficiently specific, the other party may apply for further and better particulars under the rules. Before making a formal application to the court, the party as a condition precedent must request for further and better particulars by way of letter. (para 7)

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(2) Dismissing or striking out a matter for non-compliance of procedural rule when there is no prejudice demonstrated by the opposing party and/or where the breach can be remedied by amendments will not only be a matter in oblivion to the rules but such procedural jurisprudence must be seen to be the ghost of the past unless the E said procedure is a statutory requirement which cannot be remedied. (para 8)

Case(s) referred to:

Arab Malaysia Finance Bhd v. Hasliza Hasan [2001] 6 CLJ 137 HC ***(refd)***

F *Arab Malaysian Finance Bhd v. Suhaimi AW Mohamed [2000] 1 LNS 320 HC* ***(refd)***

Batcha Ammal v. Ponnachi [1965] 2 MLJ 43 ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Blay v. Pollard & Morris [1930] 1 KB 628 ***(refd)***

G *Citibank Bhd v. Nd Chandrasegaran Nee & Ors [1999] 6 CLJ 15 HC* ***(refd)***

Diamond Peak Sdn Bhd v. United Merchant Finance Bhd [2003] 2 CLJ 8 CA ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1981] 2 MLJ 10 ***(refd)***

Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***

H *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC* ***(refd)***

Perumahan NCK Sdn Bhd v. Arab Malaysian Merchant Bank & Anor [1999] 4 CLJ 512 HC ***(refd)***

Soona Samugam v. Wee Teow Beng & Anor [1932] SSLR 91 ***(refd)***

State Government Of Perak v. Muniandy [1985] 1 LNS 117 HC ***(refd)***

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Legislation referred to:
Hire Purchase Act 1967, ss. 16(1), 43, 44
Hire Purchase Regulations 1976, r. 3(1)
Rules of the High Court 1980, O. 18 rr. 7(1), 19(1)(a)
Subordinate Courts Rules 1980, O. 1A, O. 14 rr. 13(1), (4), 21(1)(a), (2), O. 46 r. 3(a), (f)

For the appellant - Tan Khee Heng; M/s SK Ling Advocates
For the respondent/2nd defendant - Francis Teron Kadap; M/s Thomas, Shankar Ram & Co Advocates

Reported by Amutha Suppayah

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant/plaintiff's appeal (encl. 2) against the decision of the learned sessions judge who allowed the respondent/2nd defendant's (guarantor) application to strike out the appellant's action under the Hire Purchase Act 1967 (HPA 1967) on the ground the appellant failed to plead in its statement of claim, the date of service of the 4th Schedule Notice and reg. 3 notice, though it was pleaded that such notices were served on the 1st defendant, the hirer.

[2] The brief facts of the appellant's claim, *inter alia*, are as follows:

(a) the appellant is the owner and the 1st defendant is the hirer of a motor vehicle pursuant to a hire purchase agreement made pursuant to the HPA 1967 and the 2nd defendant is the guarantor. The plaintiff's claim is for balance sum under the hire purchase agreement for non payment of the installments.

(b) the statement of claim briefly, *inter alia*, reads as follows:

(i) pursuant to the said hire purchase agreement, the 1st defendant paid a deposit of RM4,200 and agreed to pay to the plaintiff without previous demand the balance of the hire purchase price amounting to the sum of RM50,597.50, by way of monthly installments.

(ii) the 2nd defendant, in consideration of the plaintiff agreeing at her request to enter into the said agreement with the 1st defendant, guaranteed on written demand the punctual payment by the 1st defendant of all sums which may become due to the plaintiff under the said agreement.

A (iii) in breach of the said agreement, the 1st defendant defaulted in the payment of not less than two successive defaults of monthly installments and failed to remedy the said defaults despite reminders from the plaintiff to do so. In consequence, the plaintiff served on the 1st defendant, by way of prepaid
B registered post, a copy of the notice dated 2 September 2005 in the form set out in the Fourth Schedule of the HPA 1967 (hereinafter referred to as "the said Fourth Schedule Notice") at her address for service. Subsequently the plaintiff also served a copy of the notice dated 19 September 2005 on the 1st
C defendant at her address for service in accordance with reg. 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 (hereinafter referred to as "the said reg. 3 Notice"). Despite the said Fourth Schedule Notice and the said reg. 3 Notice, the 1st defendant has failed, neglected and/or refused to pay the amount
D demanded therein and the plaintiff had made two attempts to locate and repossess the said vehicle but to no avail as the said vehicle could not be traced or located and was/is not kept at the address provided in the said agreement.

E (iv) by reason of the termination, the plaintiff is entitled to claim from the 1st defendant all sums or amounts due and/or owing by the 1st defendant to the plaintiff under the said agreement in the sum of RM47,649.43 with interest and costs.

(v) by a letter dated 19 January 2006 sent by way of prepaid
F registered post addressed to the 2nd defendant at his address for service, the plaintiff informed the 2nd defendant of the 1st defendant's default under the said agreement and the termination of the said agreement by the plaintiff and demanded payment of the sum. Despite the said demand, the 2nd defendant has failed,
G neglected and/or refused to pay the said sum.

(vi) in consequence, the plaintiff claims against the 1st and 2nd defendants jointly and severally for the said sum, interest and costs.

H **[3]** In support of the respondent's application, without filing a defence, the respondent filed an affidavit, *inter alia*, stating as follows:

(a) the plaintiff's summons and statement of claim disclose no reasonable cause of action, as the statement of claim did not plead/
I or contain the following requisite particulars:

(i) the date of service of Fourth Schedule Notice issued pursuant to s. 16 of HPA 1967 and actual service thereof; and the date and mode of service of notice under reg. 3 of Hire Purchase (Recovery of Possession And Maintenance of Records By Owners) Regulations 1976 and actual service thereof.

(ii) in an action under HPA 1967, the plaintiff is required to specifically plead in the statement of claim, the date of service of the Fourth Schedule Notice issued pursuant to s. 16 of the HPA 1967 and that the Fourth Schedule Notice was actually served; and the date and mode of service of Notice under reg. 3 and that the Notice under reg. 3 were actually served.

(iii) in the circumstances, the plaintiff's statement of claim dated 21 Januari 2006 discloses no reasonable cause of action and ought to be struck out.

[4] The appellant in opposing the respondent's application filed an affidavit, *inter alia*, stating that:

(a) the 2nd defendant's allegations are devoid of any merits on the following grounds:

(i) under s. 16(1) of the HPA 1967 and reg. 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976, the said Fourth Schedule Notice and the said Notice under reg. 3 shall only be served on a "Hirer" and it is not a requirement under the law to serve the aforesaid notices on a "Guarantor"; and the said Fourth Schedule Notice dated 2 September 2005 and the said Notice under reg. 3 dated 19 September 2005 have been duly served on the 1st defendant as the hirer concerned by way of registered post as pleaded in para. 10 of the said statement of claim. As a matter of fact, the judgment has been entered against the 1st defendant as the hirer thereof on 16 June 2006.

[5] The appellant, *inter alia*, submits as follows:

(a) the respondent was relying on O. 14 r. 21(1)(a) of the Subordinate Courts Rules 1980 (SCR 1980) in his attempt to strike out the said summons and statement of claim. It is trite that O. 14 r. 21(1)(a) of the SCR 1980 provides that:

(1) The court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any summons or anything in any pleading or in the endorsement, on the ground that:

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(a) it discloses no reasonable cause of action or defence, as the case may be;

(b) in *Citibank Bhd v. Nd Chandrasegaran Nee & Ors* [1999] 6 CLJ 15, Kamalanathan Ratnam J held, in the context of an application for striking out under O. 18 r. 19(1)(a) of the Rules of the High Court [which is the equivalent to O. 14 r. 21(1)(a) of the SCR 1980], that " ... So long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case would be weak and not likely to succeed at trial would not be a ground for the pleadings to be struck out".

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(c) Order 14 r. 21(2) of the SCR 1980 provides that "No evidence shall be admissible on an application under para. (1)(a)". This Order must be read in line with the Federal Court's decision in the case of *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226, whereby the Federal Court held that "in an application to strike out pleadings under O. 18 r. 19(1)(a) RHC 1980, no evidence shall be admissible and the court must consider only the pleadings for the purpose of determining whether the statement of claim disclosed no reasonable cause of action or the defence disclosed no defence."

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(d) by looking at the said statement of claim alone, it cannot be denied that the appellant's action against the 1st defendant is for the recovery of money arising out of a hire purchase agreement and suing the respondent/2nd defendant as the guarantor for the said hirer. In consequence, the appellant obviously has established and/or disclosed a valid and reasonable cause of action against the respondent, pursuant to and in compliance with O. 46 r. 3 of the SCR which provides that:

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> Where the plaintiff's claim is for the recovery of money arising out of a hire-purchase agreement, he must, in his statement of claim, give the following particulars:
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> (a) the date of the agreement and the parties thereto;
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> (b) the goods let under the agreement;
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> (c) the amount of the hire-purchase price;
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> (d) the amount paid by or on behalf of the hirer;
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> (e) the amount (if any) claimed as being due and unpaid in respect of any installment or installments of the hire-purchase price;

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(f) the amount of any other claim and the circumstances in which it arises.

(e) the appellant has in its statement of claim incorporated and clearly pleaded each and every particular required under O. 46 r. 3(a) to (f) of the SCR 1980. The aforesaid issue is not disputed by the respondent in the court below and in fact the learned sessions court judge has ruled that the appellant has complied with the said O. 46 r. 3 of the SCR 1980.

(f) in the well-established authority of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court held that " ... It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence.

(g) the respondent is only relying on two grounds namely:

(i) the plaintiff did not plead in its statement of claim the date of service of the Fourth Schedule Notice issued, pursuant to s. 16 of the HPA 1967 and the actual service thereof; and

(ii) the plaintiff did not plead in its statement of claim the date and mode of service of Notice under reg. 3 of the Hire Purchase (Recovery of Possession And Maintenance of Records By Owner) Regulations 1976 and the actual service thereof.

(iii) section 16(1) of the HPA 1967, provides that:

> Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire-purchase agreement arising out of any breach of the agreement relating to the payment of installments [unless there had been two successive defaults of payments or a default in respect of the last payment and] he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice

(iv) regulation 3(1) of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 provides that:

> An owner shall not in addition to the notice in the form set out in the Fourth Schedule of the Act send to the hirer a

notice informing the hirer that the owner intends to take possession of the goods comprised in the hire purchase agreement

(v) in reference to the above law and regulation governing a hire-purchase transaction, it is abundantly clear that s. 16(1) of the HPA 1967 and reg. 3(1) of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 only require a "Fourth Schedule Notice" and a "Notice under reg. 3" to be served on a "Hirer" and it is definitely not a requirement under the law and/or any regulation that the plaintiff shall serve the aforesaid notices on a "Guarantor" like the respondent/2nd defendant.

(vi) it is clearly not a requirement under the abovementioned O. 46 r. 3 of the SCR 1980 that the date and mode of service of the said Fourth Schedule Notice and the said notice under reg. 3 must be specifically pleaded in the plaintiff's statement of claim in order to disclose a reasonable cause of action against the respondent/ 2nd defendant. The question on when such notices were served on the hirer as pleaded in the statement of claim is a matter of evidence for the plaintiff to adduce during trial or interlocutory application to substantiate it. In fact, s. 44 of the HPA 1967 expressly allows an owner to provide proof of service of such notices required to be served under HPA 1967 by way of affidavit or oral evidence. The said s. 44 provides "The affidavit or oral evidence of an owner or his servant or agent, or of a hirer, as to the delivery, posting or service of any notice or document required or authorized to be served, given or sent by this Act is admissible as *prima facie* proof of the service, giving or sending of the notice or document."

(vii) it is also well-settled rules of pleading as provided in O. 14 r. 13(1) of the SCR 1980 [*in pari materia* to O. 18 r. 7(1) of the RHC 1980 only requires every pleading to contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence but not the evidence by which those facts are to be proved. A perusal of the said s. 16(1) of the HPA 1967 & reg. 3 of the Hire-Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 suggests that service of the said Fourth Schedule Notice and the said reg. 3 Notice respectively are the conditions precedent that must be done before an owner may sue a hirer under the HPA 1967. In this case, such notices were served on the hirer (1st defendant). It is pertinent to note that O. 14 r. 13(4) of the SCR 1980 provides that "A statement

that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading." A

(viii) in *Arab Malaysian Finance Bhd v. Suhaimi Bin AW Mohamed* [2001] 1 MLJ 149 (*Suhaimi*'s case), it was held that in order to show that he had a cause of action, the plaintiff in his statement of claim must show, *inter alia*, that he had duly complied with ss. 16 and 43 of the Act and reg. 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976. The statement of claim clearly did not contain the requisite particulars and thus it did not disclose a reasonable cause of action. It was insufficient that the Notice under the Fourth Schedule of the Act and under reg. 3 merely be issued; these notices had to be served to the hirer with particulars as to the date and mode of service. The statement of claim also did not mention anything about repossession. It is apparent that *Suhaimi*'s case (*supra*) has been misconstrued by the learned Sessions Court judge in the context of the present case. In *Suhaimi*'s case (*supra*), the statement of claim was struck out because in para. 8 of its statement of claim, the plaintiff merely pleaded that the plaintiff had issued (mengeluarkan) the said Fourth Schedule Notice and the reg. 3 Notice. The aforesaid case is therefore obviously distinguishable from our present case because, as mentioned earlier, the appellant had pleaded in its statement of claim that the said Fourth Schedule Notice and the reg. 3 Notice had been served on the 1st defendant as the hirer thereof by way of registered post and as a matter of fact, a judgment has been entered against the 1st defendant as the hirer thereof on 16 June 2006 by the Session Court. It is obvious that the *ratio decidendi* of the said *Suhaimi*'s case (*supra*) for allowing the application for striking out is because the statement of claim merely pleaded that the relevant notices had been issued and the statement of claim also did not mention anything about repossession. The opinion expressed by Mohd Hishamudin J was that "the plaintiff, in his statement of claim, must also state particulars showing clearly: (a) whether the fourth Schedule Notice had been 'served on the hirer, including the date and mode of service; (b) whether the reg. 3 notice had been served on the hirer, including the date and mode of service; …" is mere *obiter dicta* as such opinion is entirely unnecessary for the decision of the case because as a matter of fact the plaintiff in the aforesaid case did not even plead that such notices had been served on B C D E F G H I

the hirer. In any event, the above opinion expressed by Mohd Hishamudin J is not binding on this court as it is very clear that no such requirement at all is provided in s. 16 of the HPA 1967, reg. 3 of the Hire Purchase (Recovery of Possession and Maintenance of Records by Owners) Regulations 1976 and O. 46 r. 3 of the SCR 1980.

(ix) the decision of the learned Sessions Court judge in striking the appellant's action against the respondent is most unfair and unjust to the appellant who is not in breach of any rules of the court. Even in a case where there is a noncompliance with any rules of the court, it is now trite law that the judge is still required to consider whether such non-compliance has occasioned a substantial miscarriage of justice and this is clearly expressed by the rules committee in 2003 through the enactment of O. 1A of the SCR 1980 which provides that "In administering any of the rules herein, the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein." and O. 2 r. 3 of the SCR 1980 which provides that "A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceeding only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice."

[6] The respondent, *inter alia,* submits as follows:

(a) The appellant's/plaintiff's statement of claim shows no reasonable cause of action by failing to plead the followings material facts:

(i) the date of service of Fourth Schedule Notice (hereinafter referred top as "the Fourth Schedule Notice") issued pursuant to s. 16 of the HPA 1967;

(ii) whether the said Fourth Schedule Notice was actually served;

(iii) the date of service of Notice under reg. 3

(iv) the mode of service of reg. 3 Notice; and

(v) whether reg. 3 Notice was actually served.

(b) the above are pre-requisites to filing an action under HPA 1967 and must be specifically pleaded in the statement of claim. In *Suhaimi*'s case (*supra*), His Lordship Justice Mohd Hishamudin J, in High Court held that:

> In my judgment, in civil action for recovery of money arising out of a hire-purchase agreement, in light of provisions of ss. 16 and 43 (43A as the case maybe) of the Act and reg. 3 of the Regulations, the plaintiff, in his statement of claim, apart from showing that there has been compliance with O. 46 of the SCR, must also state particulars showing clearly that there has been compliance with such provisions of the Act and Regulations. The requisite particulars are, *inter alia*, regarding the following:
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> (a) whether the Fourth Schedule Notice had been served on the hirer, including the date and mode of service;
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> (b) whether the reg. 3 Notice had been served on the hirer, including the date and mode of service;
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> (c) whether the vehicle in question had been repossessed, including the date of repossession; and
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> (d) whether the Fifth Schedule Notice had been served on the hirer and guarantor, including the date and mode of service.
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> It is my judgment that if the above particulars are not stated in the statement of claim then the statement of claim does not disclose a reasonable cause of action.
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> …
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> There is no compliance even with particulars (a) and (b), let alone particulars (c) and (d); for it is not sufficient for the fourth schedule notice and reg. 3 notice merely to be issued (mengeluarkan): these notices had to be served (diserahkan) to the Hirer. Great care must be taken when drafting statement of claim. Pleadings are not meant to be mere formalities.

(c) the High Court in *Arab Malaysia Finance Bhd. v. Hasliza Hasan* [2001] 6 CLJ 137, His Lordship Ramly Ali JC held that:

> Basically, I agree with Mohd. Hishamudin J as to all the required particulars that need to be included in the plaintiff's statement of claim for recovery of moneys arising out of a hire-purchase agreement as listed above.

(d) by way of analogy, the Court of Appeal in *Diamond Peak Sdn. Bhd. v. United Merchant Finance Bhd.* [2003] 2 CLJ 8, His Lordship Justice Abdul Kadir Sulaiman JCA held that:

> In the present case, the respondent clearly has failed to comply with mandatory requirements of O. 83 r. 3(3)(c) and 3(6) of the RHC as enumerated above. On this ground too we were of the view that this appellant's appeal ought to be allowed.

[7] I have considered the submission of the appellant and respondent in detail. To decide this appeal, I must consider whether failure to plead some particulars under the HPA 1967 (where it is not expressly required to do so) will be fatal to a claim based on the hire purchase agreement. For this purpose, it is necessary to visit the principles and the rules as to pleadings which are set out both in Subordinate Courts and High Court Rules 1980 relevant to the facts of this case. It may be summarised as follows:

(a) Pleadings are statements in writing, drawn up and filed by each party to an action stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer. It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts, which they had not pleaded (see *State Government Of Perak v. Muniandy* [1985] 1 LNS 117 HC). In *Blay v. Pollard & Morris* [1930] 1 KB 628 Scrutton LJ observed:

> Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment.

(b) The importance of pleadings was emphasised by the Supreme Court in the case of *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239. The court stated that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal. In *K.E.P. Mohamed Ali v. K.E.P. Mohamed Ismail* [1981] 2 MLJ 10, HRH Raja Azlan Shah CJ (as HRH then was) observed:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

(c) If the particulars stated in the pleadings are not sufficiently specific, the other party may apply for further and better particulars under the rules. Before making a formal application to the court, the party as a condition precedent must request for further and better particulars by way of letter. If the other party does not reply or satisfactorily reply to the request then a formal application to the court will be in order (see *Soona Samugam v. Wee Teow Beng & Anor* [1932] SSLR 91). If a request by letter is not made then the court may refuse to make the order unless the court is of the opinion

that there were sufficient reasons for an application by letter not having been made. In *Batcha Ammal v. Ponnachi* [1965] 2 MLJ 43, it was stated that the question of further and better particulars is essentially a matter of discretion and the object is to ensure that the defendant is informed with reasonable particularity as to the various matters which are alleged against him.

(d) In *Perumahan NCK Sdn Bhd v. Arab Malaysian Merchant Bank & Anor* [1999] 4 AMR 4612, the issue was whether failure to furnish particulars of averments in statement of claim is an abuse of process of court. Abdul Aziz Bin Mohammad J (as His Lordship then was) held that:

> A prospective plaintiff should before plunging into litigation ensure upon sufficient preparation that he is able to make out a case. Failure to do so, would render the pleadings wanting in particulars, and upon a request being made for such particulars, the action may be deemed to be speculative litigation. Such speculative litigation (as was revealed in the *Wharf* case) is an abuse of the process of the court, and would be enormously and unfairly burdensome to a defendant and should not be allowed to continue.
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> As opposed to the instant case, the statement of claim in the *Wharf* case was plainly an insufficient pleading, for the defendants were unable to ascertain with any precision, the case that was being made out against them. However the failure to comply with the rules of pleadings was not the reason for the statement of claim in the *Wharf* case being found to be an abuse of process of the court. On the contrary, the abuse of process in that case lay in what was revealed upon a request being made by the defendant, for further particulars, i.e. that the plaintiff's action in the *Wharf* case was speculative litigation.
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> The *Wharf* case cannot therefore be used as authority for the proposition that a statement of claim that does not comply with the rules of pleadings, or which is lacking in particulars, is an abuse of the process of the court. In the circumstances, the statement of claim in the instant case did not warrant striking out merely because it was deficient in particulars.

[8] I am inclined to accept the submission of the appellant in this case, failing which the appellant will be penalized for not breaching the rules or HPA 1967 and the respondent will be rewarded for raising a procedural objection which is not found in the rules of procedure, or any part of the HPA 1967. In my view, dismissing or striking out a matter for non-compliance of procedural rule when there is no prejudice

demonstrated by the opposing party and/or where the breach can be remedied by amendments will not only be a matter in oblivion to the rules but such procedural jurisprudence must be seen to be the ghost of the past unless the said procedure is a statutory requirement which cannot be remedied.

[9] For reasons stated above, it is my judgment that the appeal, encl. 2 must be allowed with costs and the costs to be taxed and paid by the respondent to the appellant. I hereby order so.